

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SHORELINE OIL CO., INC.	:	
for Revision of a Determination or for Refund	:	DETERMINATION
of Sales and Use Taxes under Articles 28 and 29	:	DTA NO. 806954
of the Tax Law for the Year 1984.	:	

Petitioner, Shoreline Oil Co., Inc., 34 Evans Street, New Rochelle, New York 10805, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the year 1984.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 12, 1991 at 1:15 P.M. The Division of Taxation filed its brief on September 30, 1991. Petitioner filed its brief on February 13, 1992 and the Division was afforded until March 18, 1992 to reply. Petitioner appeared by Carl S. Levine, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

- I. Whether petitioner timely filed an application for a refund pursuant to Tax Law § 1139(a).
- II. Whether petitioner has standing to claim a refund on behalf of another taxpayer which did not timely file an application for refund.
- III. Whether petitioner is entitled to a refund pursuant to the special refund provision of Tax Law § 697(d).

FINDINGS OF FACT

On or about April 30, 1983, a bulk sale took place between Northern Hudson Oil Co., Inc., seller, and three purchasers, to wit: Shoreline Oil Co., Inc., Panco Equipment Corp. and

Ronald Pufhal.

Following the sale, the Division of Taxation conducted an audit of Northern Hudson's available books and records which revealed taxes due as follows:

Audited Sales and Use Taxes Due from Northern Hudson	\$ 9,886.68
Sales Tax Due from Bulk Sale of Assets to:	
Panco	1,760.69
Pufhal	977.50
Shoreline Oil Co., Inc.	<u>23,511.40</u>
Total	\$36,136.27

Panco, Pufhal and Hudson made payments totalling \$12,625.17, plus interest, reducing the outstanding liability from \$36,136.27 to \$23,511.10, plus statutory interest.

From the record in this matter, it is clear that a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to Northern Hudson Oil Co., Inc. on August 15, 1983, for the period March 1, 1982 through June 30, 1983, notice number S830815201L. Northern Hudson's president, Victor Kennon, by letter dated September 20, 1983, informed the Division that Pufhal had already paid \$977.50 of the assessment and Panco had paid \$915.00. With said letter, Northern Hudson enclosed a check in the sum of \$9,886.68, plus \$641.08 in interest, for its portion of the tax asserted on notice number S830815201L. The letter also stated that Shoreline was protesting its portion of the assessment in the sum of \$23,511.40 which included the tax assessed on the customer list and other property acquired from Northern Hudson in the bulk sale.

In a letter dated December 21, 1983, from one Edward P. Hand to the White Plains District Office it was reiterated that the portion of assessment number S830815201L with regard to the sale of a customer list by Northern Hudson to Shoreline Oil was "presently under protest" by Shoreline. By letter also dated December 21, 1983, the same Mr. Hand sent a letter to the New York State Tax Commission, Tax Appeals Bureau, allegedly enclosing three executed copies of a petition with regard to assessment number S830815201L and once again stating that the "portion of the transfers attributable to the sale of customer lists to Shoreline Oil Co., Inc. is already under protest filed with your office on October 11, 1983." Said petitions were not placed in evidence.

There is no other evidence indicating further action by Northern Hudson with regard to its assessment, including any evidence of any proceedings before the former Tax Appeals Bureau.

On or about May 18, 1984, Northern Hudson Oil Co., Inc. was notified by the Division of Taxation that an overpayment of tax by Northern Hudson had been applied to assessment number S830815201L in the sum of \$17,686.09.

It is this sum for which petitioner herein seeks a refund, pursuant to an assignment dated April 12, 1985 by Northern Hudson Oil Co., Inc. to Shoreline Oil Co., Inc. for "any and all claims for reimbursement of sales taxes paid to the State of New York as a result of the sale to SHORELINE OIL CO., INC. of certain of the customer lists of WESTCHESTER HUDSON FUEL CO., INC. on or about April 30, 1983."¹

On August 15, 1983, the Division issued to Shoreline Oil Co., Inc. a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessment number S830815200L, setting forth total tax due of \$36,136.27, plus interest. On the same date, the Division issued to Shoreline Oil Co., Inc. a Notice of Assessment Review which reflected a reduction in the tax liability set forth on said notice to \$23,511.40, plus interest. This adjustment reflected the payments made by Panco, Pufhal and Northern Hudson set forth in Finding of Fact "1" above. Petitioner timely protested this assessment, as modified, but its petition was denied by the New York State Tax Commission on January 28, 1986. Petitioner filed an Article 78 proceeding and paid tax and interest due in the sum of \$30,223.32. It also paid \$250.00 representing security for costs.

On or about February 19, 1987, the Court of Appeals in Audell Petroleum Corp. v. New York State Tax Commission (69 NY2d 818, 513 NYS2d 962) ruled that the sale of a customer list by an entity not in the business of selling customer lists was not subject to sales tax. On April 6, 1987, petitioner and the former State Tax Commission entered a stipulation

¹The record reflects a claim of \$17,000.00 which was an estimate made in the September 29, 1987 letter from Dolores David to the Division (Division's Exhibit "F").

discontinuing the Article 78 proceeding. Thereafter petitioner received a full refund on notice number S830815200L, which included the assessment of tax on the customer list acquired in the bulk sale from Northern Hudson.

On September 29, 1987, Shoreline Oil Co., Inc. directed a letter to the Central Office Audit Bureau - Sales Tax Refunds Bureau indicating that the letter was to "serve as a protective claim so that the statue [sic] of limitations does not run out and we will be able to recover our money." The letter also indicated that Northern Hudson had lost \$17,000.00 of a refund which had been applied to its assessment number S830815201L with regard to the sale of the customer list. The letter further alleged that Shoreline Oil Co., Inc. "had to pay them for this amount and they then assigned us this amount if and when the case was settled."

It is noted that the refund was applied to the assessment against Northern Hudson in May of 1984 (Finding of Fact "4" above) and Northern Hudson's right to that money was not assigned to Shoreline until April 12, 1985. Further, the assignment document does not indicate any consideration paid to Northern Hudson. The only reference to consideration was made in the September 29, 1987 letter to the Central Office Audit Bureau from Ms. Dolores David, vice-president of corporate operations for Shoreline Oil, which stated that Shoreline had paid \$17,000.00 to Northern Hudson ("Northern Westchester", a predecessor corporation).

On December 2, 1987, the Division of Taxation, by one L. Clark, tax auditor, Central Sales Tax Section, denied petitioner's claim for refund and stated the following explanation:

"With regards to the \$17,000.00 you paid to Northern Oil Co., Inc. This was money that was withheld from Northern Hudson and applied to an assessment against them on May 18, 1984. A claim for refund of such money would have to have been filed with the State on or before May 18, 1987 in order to be within the Statute of Limitation. The law provides for a three year Statute of Limitation from the date taxes are due and payable in which to apply for a refund. In view of the fact that your request for such refund was not filed until September 29, 1987, the Statute had expired and your claim must be denied."

It is this denial of refund which petitioner protests in the instant proceeding.

CONCLUSIONS OF LAW

A. Tax Law § 1139(a) provides, in pertinent part, as follows:

"In the manner provided in this section the tax commission shall refund or credit

any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the tax commission (i) in the case of tax paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable by such person to the tax commission as provided in section eleven hundred thirty-seven, or (ii) in the case of a tax, penalty or interest paid by the applicant to the tax commission, within three years after the date when such amount was payable under this article, or (iii) in the case of a tax due from the seller, transferor or assignor and paid by the applicant to the tax commission where the applicant is a purchaser, transferee or assignee liable for such tax pursuant to the provisions of subdivision (c) of section eleven hundred forty-one of this chapter, within two years after the giving of notice by the tax commission to such purchaser, transferee or assignee of the total amount of any tax or taxes which the state claims to be due from the seller, transferor or assignor...." (Emphasis added.)

The provisions of Tax Law § 1139(a) and the regulation at 20 NYCRR 534.2(b), with respect to applications for refund, specifically address "tax paid by the applicant". The law and regulations clearly anticipate claims for refund to be made by those taxpayers who paid the tax. In this case, the tax subject to the instant refund claim was paid by Northern Hudson. Northern Hudson has never made an application for refund of the tax paid by it on May 18, 1984 in the sum of \$17,686.49 representing sales tax on the customer list it transferred to petitioner.

Thus, it is concluded that petitioner has no standing to claim this refund since it did not pay the tax, as anticipated by the statute and regulations.

With regard to Northern Hudson's assignment of its "claims for reimbursement of sales taxes paid to the State of New York", it appears that Northern Hudson was attempting to give petitioner both its status as well as its grievance. However, it has been held that status is personal and not assignable, and the attempt to circumvent the status requirement by petitioner is contrary to public policy (Weimer v. Board of Education of Smithtown Central School District No. 1, 52 NY2d 148, 436 NYS2d 853, 857-858). Therefore, petitioner herein is without standing notwithstanding the assignment from Northern Hudson.

B. Assuming arguendo that petitioner herein could make such an application as an assignee of Northern Hudson, it did not do so in a timely manner.

On May 18, 1984, Northern Hudson Oil Co., Inc. was notified that it had made an overpayment to the Division of Taxation which had been applied against assessment number S830815201L. However, the tax due for the quarter ending June 30, 1983 was payable by

July 20, 1983 (Tax Law § 1136[b]). Since the application for refund was made on September 29, 1987, the application was not within three years of the date payable. Therefore, the application for refund of the amount paid by Northern Hudson was not timely and was properly denied by the Division (Tax Law § 1139[a][ii]; 20 NYCRR 534.2[b]).

Further, the period of limitation was not tolled by the filing of a petition by Northern. Northern Hudson never filed a petition in response to assessment number S830815201L. Petitioner's argument that the September 20, 1983 letter from Northern Hudson's president, Victor H. Kennon, was a valid petition is without merit. The letter merely explained how the tax was being paid, enclosed a check for what he believed Northern Hudson owed and indicated that petitioner, Shoreline, was protesting its assessment. The evidence indicated that petitions, if any, were not submitted by Northern's attorney until December 21, 1983, more than four months after issuance of the notices. That, however, is rendered moot since, as stated in Finding of Fact "2" above, petitioner never proved that Northern ever petitioned its assessment.

C. Petitioner raised the issue that an alternative theory of recovery lies in the special refund authority of the Commissioner of Taxation and Finance set forth in Tax Law § 697(d). Said section states, in pertinent part, as follows:

"Where no question of fact or law are involved and it appears from the records of the tax commission that any moneys have been erroneously or illegally collected from any taxpayer or other person, or paid by such taxpayer or other person under a mistake of facts, pursuant to the provisions of this article, the tax commission at any time, without regard to any period of limitations, shall have the power, upon making a record of its reasons therefor in writing, to cause such moneys so paid and being erroneously and illegally held to be refunded and to issue therefor its certificate to the comptroller."

Tax Law § 697(d) is applicable only to Article 22 (income tax), not Articles 28 and 29 (sales and use taxes). Therefore, petitioner's argument on this issue has no merit.

D. The petition of Shoreline Oil Co., Inc. is denied and the denial of its application for refund by the Division of Taxation is sustained.

DATED: Troy, New York
May 28, 1992

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE